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No. 92-1937

In The

Supreme Court of the United States

October Term, 1993

MIGUEL MEDRANO,

Petitioner,

v.

EXCEL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an employee's state-law claim alleging retaliatory discharge for settling a workers' compensation claim preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, when the state-law claim is founded on the allegation that the provision of the collective bargaining agreement under which the employee was terminated is itself illegal and discriminatory, and when the alleged discrimination is a deprivation of rights found only in another provision of the collective bargaining agreement?

LISTING OF PARTIES IN THE COURT BELOW

The names of all parties to the proceeding in the Court of Appeals appear in the caption of the case. Excel Corporation is a wholly-owned subsidiary of Cargill, Incorporated.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LISTING OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	iv
COLLECTIVE BARGAINING AGREEMENT	2
STATEMENT OF THE CASE	3
A. Facts	3
B. Proceedings Below	5
SUMMARY OF ARGUMENT	8
ARGUMENT AND AUTHORITIES	10
A. The Court of Appeals Correctly Held That Petitioner's Claim Falls Within The Preemptive Scope of Section 301	10
1. Respondent's liability is contingent upon a determination that the CBA violates state law	12
2. Section 11(F) does not, on its face, violate state law; thus, it must be interpreted	13
3. Petitioner's discrimination claim is actually a request for enforcement of another CBA provision	18
B. The Court of Appeals' Decision Does Not Insulate Labor Contracts From Review	19
C. This Case Is Not An Appropriate Vehicle for Revisiting the Scope of Federal Preemption	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Ackley v. Local Union 337, 910 F.2d 1295 (6th Cir. 1990) 20

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) *passim*

Calvillo v. Excel Corp., No. CA5-91-075-C (N.D. Tex. 1991) 6

Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977) 20

Del Costello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) 20

Eldridge v. Felec Services, Inc., 920 F.2d 1434 (9th Cir. 1990) 22

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 21

Gardiner v. Sea-Land Service, Inc., 786 F.2d 943 (9th Cir. 1986) 15

Harris v. American Red Cross, 752 F. Supp. 737 (W.D. Tex. 1990) 18

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) ..... *passim*

Malden Mills v. ILGWU Nat'l Retirement Fund, 766 F. Supp. 1202 (D. Mass. 1991) 21

Medrano v. Excel Corp., 985 F.2d 230 (5th Cir. 1993) 5, 11, 12, 15

Muschany v. United States, 324 U.S. 49 (1945) 21

National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) 15

TABLE OF AUTHORITIES – Continued

Page

Pope v. MCI Telecommunications Corp., 937 F.2d 258 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1956 (1992) 18

Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559 (5th Cir. 1992).....14, 18

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 10

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).....10, 20

United Paperworkers' Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 21

United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 15

Vaca v. Sipes, 386 U.S. 171 (1967)..... 20

W. R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) 21

Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990)..... 11

STATUTES AND RULES

Labor Management Relations Act, Section 301,

29 U.S.C. § 185(a) 1, 9, 10

National Labor Relations Act, Section 9(a),

29 U.S.C. § 159(a) 20

Rules of the Supreme Court of the United States

Rule 15..... 1

Rule 15.1..... 3

Rule 24.2..... 3

TABLE OF AUTHORITIES – Continued

Page

Rules of the Texas Industrial Accident Board

Rule 55.15 16

Texas Workers' Compensation Act,

Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1993) 1, 6, 12, 14, 20

Tex. Rev. Civ. Stat. Ann. art. 8308-4.33(c) (Vernon Supp. 1993) 16

MISCELLANEOUS

Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575 (1992) 22

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the rules of this Court, respondent Excel Corporation submits this brief in opposition to petitioner Miguel Medrano's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition"). The opinion of the Court of Appeals is reported at 985 F.2d 230 and is reproduced in the appendix to the Petition. The relevant statutes, Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and Article 8307c of the Texas Revised Civil Statutes, are set forth in the Petition, at 2-3.

COLLECTIVE BARGAINING AGREEMENT

Petitioner's employment was governed by a collective bargaining agreement between Excel Corporation, Plainview, Texas, and United Food and Commercial Workers District Local #540 (the "CBA"). Article XVII, Section 11, of the CBA provides as follows:

> **Section 11:** An employee shall lose his seniority for the following reasons:
>
> A. Voluntary quitting (if an employee is absent from work three (3) or more consecutive days without notifying the Company or without good cause, he will be deemed to have voluntarily terminated his employment).
>
> B. Discharge for cause.
>
> C. Failing to report at the expiration of a leave of absence without good cause.
>
> D. Absence from work for any reason for a period of more than eighteen (18) months.
>
> E. Employees recalled from layoff under the provisions of Section 4 (G) will have five (5) working days to return to work after being notified by certified letter or telegram return receipt requested, sent to their last known address. Employees failing to report within five (5) working days of the date the letter or telegram is sent will lose their seniority. An additional five (5) days will be granted if requested by the employee within the first five (5) days.
>
> F. Full settlement with an employee for a disability that the Company can not accommodate.

STATEMENT OF THE CASE

Pursuant to Rules 15.1 and 24.2 of the rules of this Court, respondent respectfully points out the following additions and corrections to petitioner's statement of the case.

A. Facts.

Respondent submits the following chronology, which it believes provides a more accurate and complete summary of petitioner's pertinent employment and injury history than that set forth in the Petition.

June 1989	Petitioner first employed by respondent. Statement of Facts ("S.F.")[1] at 240.
November 3, 1989	Petitioner injured his left wrist. S.F. at 246.
November 6, 1989	Petitioner injured his right arm and shoulder. S.F. at 246.
November 21, 1989	Petitioner reinjured his right arm and shoulder. *Id.*
November 1989	Following his injuries, petitioner stopped working, filed two workers' compensation claims, and collected weekly compensation benefits. S.F. at 247, 253.

[1] The Statement of Facts ("S.F.") is the transcript of trial proceedings, which was filed as part of the record in the Court of Appeals.

October 5, 1990	Petitioner returned to work with restrictions that temporarily limited use of his wrist and shoulder. S.F. at 247-48. Respondent testified that it attempted to accommodate these restrictions by giving petitioner the position of the "third man" on what is ordinarily a two-person job. S.F. at 207-08. However, petitioner continued to experience problems with his shoulder and wrist. S.F. at 208.
November 12, 1990	Petitioner saw his shoulder doctor, who gave him more severe restrictions on use of his shoulder and advised him that he needed a new job, because his old job was too stressful on his shoulder. S.F. at 209.
November 13, 1990	Petitioner saw his wrist doctor, who severely restricted use of his wrists. S.F. at 209-10. The combination of his shoulder restrictions and his wrist restrictions prevented petitioner from performing any job at the plant, and he was taken off work. S.F. at 210.
November 28, 1990	Petitioner settled the two workers' compensation claims in connection with his November 1989 injuries for a lump sum of approximately $27,000. S.F. at 252-53. At the time of

	settlement, respondent had no jobs available within petitioner's medical restrictions. S.F. at 214-15.[2]
January 11, 1991	Respondent's safety director and the union steward each testified that they informed petitioner on this date that he was being discharged pursuant to Article XVII, Section 11(F), of the CBA. S.F. at 65, 94-95, 334-36.
January 15, 1991	Petitioner received and sought to present to respondent modified medical restrictions. S.F. at 233.

B. Proceedings Below.

1. Petitioner's attack on the legality of the CBA was a novel, offensive tactic.

Petitioner states that:

> Rather than waiting for respondent to put its CBA-based defense before the jury, petitioner met the defense head-on in his case-in-chief,

---

[2] Petitioner's statement that "[t]he evidence was conflicting" on this point (Petition at 4) is incorrect. There was no evidence that respondent had jobs available on the date of settlement that could have been performed by a person with petitioner's medical restrictions. The Court of Appeals specifically found that, on the date of petitioner's settlement, "there were no jobs available at Excel that could accommodate Medrano's medical restrictions." *Medrano v. Excel Corp.*, 985 F.2d 230, 231 (5th Cir. 1993).

> arguing that respondent's general policy regarding the reinstatement of injured workers, based on whether they demanded workers' compensation settlement, was itself a form of unlawful discrimination in violation of article 8307c.

Petition at 5. This statement inaccurately characterizes petitioner's trial strategy as an attempt at anticipatory rebuttal to respondent's defensive posture. Such a characterization mistakenly implies that respondent's CBA defense was the reason the claim was preempted.

Petitioner's argument that the CBA was illegal and discriminatory was not a rebuttal position, but was in reality a new, aggressive theory of liability. This novel strategy had not been revealed in petitioner's pleadings or in discovery, and it was clearly propounded at trial to avoid the inevitable failure of petitioner's pleaded "pretext" theory of the case.

Petitioner's case was the second of some forty companion cases that were pending for trial seriatim in the autumn of 1991. Each of those cases had been pleaded on the theory that the plaintiff had been fired in retaliation for filing a workers' compensation claim and that respondent's defense of the terminations, based on various provisions of the CBA, was mere pretext. The pretext theory had proved unsuccessful just days earlier, when the first of the companion cases, *Calvillo v. Excel Corp.*, No. CA5-91-075-C (N.D. Tex. 1991), which was premised on the very same provision of the CBA, resulted in a finding of no liability for respondent.

When he launched his attack on the CBA in voir dire and opening statement, petitioner was responding to this

failure of his initial theory, not to respondent's consistent defense theory. It was petitioner's charge, in his own words, that the CBA "was itself a form of unlawful discrimination," Petition at 5, that raised the issue requiring preemption of this case.

2. Respondent's actions were governed by the CBA.

Petitioner's statement of the case continues, stating:

> On several occasions, management witnesses were asked whether it was true that, as the CBA seemed to state, injured workers who did not demand settlements could take eighteen months to return to work without losing their places in the plant, while injured workers who did demand such settlements would have to be able to come back to work immediately or lose their jobs. On each occasion, the witnesses conceded that this was an accurate statement of *management policy*, although they denied that this constituted retaliation.

Petition at 5 (emphasis added). The testimony of Excel's management witnesses is clear and unambiguous – none testified that the situation summarized by petitioner above was "an accurate statement of management policy." Instead, every management witness testified that the CBA required termination of employees who settled claims on the basis of disabilities that prevented them from returning to work. *See, e.g.*, S.F. at 46, 145. The distinction between "management policy" and a negotiated provision of the CBA is obvious and significant. This procedure was not some arbitrary path followed by Excel

management to the detriment of its employees. On the contrary, it was the path dictated by the representatives of management and the Union as a result of the collective bargaining process, representing a legitimate effort to serve the interests of all Excel employees.

3. Respondent has not conceded that the CBA is discriminatory.

Petitioner asserts that respondent, in its motion to dismiss at trial and in its motion for judgment notwithstanding the verdict, argued that petitioner's claim was preempted "because petitioner was attacking a discriminatory policy that was reflected in a CBA." Petition at 5-6. Respondent has never argued – but rather has consistently denied – that Article XVII, Section 11(F), is unlawfully discriminatory.

SUMMARY OF ARGUMENT

Petitioner's claim is clearly preempted by federal law. The Court of Appeals correctly held that, by challenging the legality of the CBA, petitioner had brought his claim squarely within Section 301's preemptive scope. This Court has addressed this issue directly, holding that a retaliatory discharge claim must be decided under federal law if the claim requires an interpretation of a collective bargaining agreement. Here, as the Court of Appeals found, the CBA must be construed for resolution of petitioner's state-law claim. Petitioner has asserted no basis for respondent's liability other than the alleged conflict between the CBA and Texas law. However, the disputed provision of the CBA has never been held to be unlawful,

and is not retaliatory or discriminatory on its face. Thus, any determination of the legality of the CBA must be governed by federal labor-law principals.

This Court's holdings in *Lingle* and *Allis-Chalmers*, as applied by the Court of Appeals here, will not permit employers and unions to override state laws through collective bargaining as petitioner claims. Federal labor law provides an adequate remedy for such attempts. The Court of Appeals did not hold that state-law retaliatory discharge claims are preempted when the discharge can be shown to be unlawful without interpretation of the labor contract. Thus, the decision below does not compel preemption when a collective bargaining agreement provision, on its face, violates state law. Even where, as here, the need to interpret the collective bargaining agreement requires preemption, the contract may be invalidated under federal law; and state law may be employed to guide the formulation of federal policy in the arbitral and judicial process.

Finally, this is not an appropriate circumstance, as petitioner posits, for this Court to "speak once more" to the proper scope of preemption under Section 301. This Court has directly addressed and clearly defined the scope of preemption in cases alleging wrongful discharge for filing a workers' compensation claim. Further review of this case will not assist lower courts struggling to determine the outer boundaries of Section 301's preemptive field, because this case sits squarely at the center of that field. This case does not raise the issue of whether a state-law claim is preempted when the employer asserts a defense under the collective bargaining agreement or when the collective bargaining agreement, on its face,

violates state law. Moreover, the state-law claim asserted here not only requires an interpretation of the CBA provision alleged to be unlawful; it also requires *enforcement* of yet another CBA provision, a situation even petitioner acknowledges to be within the preemptive field. Accordingly, this case is not an appropriate vehicle for defining the outer limits of preemption in the workers' compensation context, much less in the broader areas suggested in the Petition.

ARGUMENT AND AUTHORITIES

A. The Court of Appeals Correctly Held that Petitioner's Claim Falls Within the Preemptive Scope of Section 301.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("Section 301") "authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). When the resolution of a state-law claim depends upon the analysis of a term of a collective bargaining agreement, "the application of state law . . . is preempted [by Section 301] and federal labor-law principals – necessarily uniform throughout the nation – must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). In such a case, the "claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law." *Allis-Chalmers*

Corp. v. Lueck, 471 U.S. 202, 220 (1985) (citations omitted). To determine whether a state-law claim is preempted, it must be determined whether evaluation of the claim "is inextricably intertwined with consideration of the labor contract." *Id.* at 213. A state-law remedy is "independent" of the collective bargaining agreement for Section 301 preemption purposes if, and only if, "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407. On the other hand, Section 301 requires preemption when provisions of the collective bargaining agreement "govern, or reasonably might be construed as governing," the claim. *Wells v. General Motors Corp.*, 881 F.2d 166, 174 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

From these tenets, a single governing principle emerges: a plaintiff's state-law retaliatory discharge claim will be preempted where resolution of the case depends upon interpretation of a term of the collective bargaining agreement. *See Lingle*, 486 U.S. at 407. This straightforward principle governed the Court of Appeals' review of this case. *See Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir. 1993). It also provides the standard for analysis of the single question relevant to petitioner's claim before this Court: does petitioner's allegation that the relevant provision of the CBA is itself unlawful depend upon interpretation of a term of the CBA? Under the facts of this case, the correct answer, and the answer reached by the Court of Appeals, is that it does.

It is undisputed that petitioner was discharged pursuant to a provision of the CBA, and petitioner offered no basis for a finding of liability other than the alleged

illegality of the CBA provision itself. However, the disputed CBA provision has never been determined to be unlawful and is not, on its face, violative of state law. Consequently, interpretation of the CBA is essential to a resolution of petitioner's claim.

1. Respondent's liability is contingent upon a determination that the CBA violates state law.

Although his pleadings accused Excel of using the CBA as a "pretext" for discharging him in retaliation for exercising his rights under Texas workers' compensation laws (*see* Second Amended Complaint, Record at 189-92, ¶¶ VI-VII), petitioner abandoned his pretext argument at trial, arguing instead that Article XVII, Section 11(F), of the CBA itself constitutes discrimination against all employees who settle workers' compensation claims.

Petitioner's trial attorney told prospective jurors during voir dire that they would "be asked to consider whether *this rule* [Article XVII, Section 11(F)] violates the law" and whether the fact that the provision was contained in a "union contract" would keep them "from fairly considering *the issue* at hand, which is *whether that rule discriminates* against employees that settle claims." S.F. at 8-9, quoted by the Court of Appeals, *Medrano*, 985 F.2d at 234 n.4 (emphasis by Court of Appeals). Petitioner's attack on the CBA continued throughout trial and during closing argument. As the Court of Appeals concluded, "Medrano was not challenging the actions of his employers under section 8307c; instead, he was challenging a provision of the CBA that was applied by his employer." *Id.* at 234.

Petitioner does not dispute that conclusion. Moreover, he no longer disputes the Court of Appeals' conclusion that respondent "faithfully applied" the CBA and that Section 11(F) was "the basis for [petitioner's] termination." *Id.* Not a single witness, including petitioner himself, testified that he was discharged in retaliation for settling a workers' compensation claim, and no document supports that conclusion. Petitioner simply offered no evidence to support a finding of discrimination apart from the allegedly illegal and discriminatory CBA provision.

2. Section 11(F) does not, on its face, violate state law; thus, it must be interpreted.

Article XVII, Section 11(F), of the CBA provides that an employee "shall lose his seniority for . . . full settlement . . . for a disability that the Company can not accommodate." Record at 359. Petitioner assumes that Section 11(F) is unlawfully discriminatory under Texas workers' compensation law, and complains that an illegal contract should not be permitted to preempt his state-law claim. Respondent acknowledges that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212. But no determination has ever been made that Section 11(F) is discriminatory or retaliatory or unlawful; and no such determination can be made from the face of the CBA.

Petitioner offered no evidence that Section 11(F) had a retaliatory purpose. Indeed, the undisputed testimony was to the contrary. S.F. at 408-09, 415-16. The trial court

was not asked to make a determination that, as a matter of law, the provision was unlawful or discriminatory, nor has any other tribunal made such a finding.

Petitioner argues that the effect of Section 11(F), when applied in conjunction with Section 11(D), is to treat employees who settle their compensation claims for a lump sum differently from those who do not settle their claims, but continue to collect weekly workers' compensation benefits. Those who do not settle claims are allowed 18 months to recuperate, while those who accept a full settlement of their claims must be ready to return to work based on their medical status at the time of settlement. Petition at 4, 5. Not every difference in treatment, however, is an unlawful discrimination.

Petitioner's claim does not fall into one of the four categories proscribed by article 8307c. Article 8307c prohibits an employer only from discharging or otherwise discriminating *against* an employee

> because the employee has in good faith [1] filed a claim, [2] hired a lawyer to represent him in a claim, [3] instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workman's Compensation Act, or [4] has testified or is about to testify in any such proceeding.

Tex. Rev. Civ. Stat. Ann. art. 8307c, Section 1 (Vernon Supp. 1993). "Unless one of the four specific circumstances listed in article 8307c motivated the employer in discharging or discriminating against an employee, that employee cannot prevail in an action based on article 8307c." *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 563 (5th Cir. 1992). Section 11(F) does not deal

directly or indirectly with any of these acts. As the Court of Appeals made clear, petitioner alleged that respondent "discriminated against him because he *settled* a workers' compensation claim, not because he *filed* one." *Medrano*, 985 F.2d at 233 (emphasis in original).

Here, the alleged discrimination is between two sets of employees, each of which is collecting workers' compensation benefits. Employees in one set are collecting weekly benefits while restricted from working; the others have settled their claims for lump sums in lieu of continued weekly benefits. Respondent submits that the CBA, including Section 11(F), which was negotiated between itself and the union representing its employees, fairly adjusts the interests of all employees and is neither retaliatory nor discriminatory.[3]

This can be demonstrated by the example of petitioner himself. Petitioner had been receiving benefits of $184 per week since November 1989. S.F. at 253. On

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[3] "The collective agreement covers the whole employment relationship. It calls into being a new common law of a particular industry or of a particular plant." *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). Our national labor policy is built on the belief that, by pooling their economic strength and bargaining as a group, workers can improve their conditions according to the group's priorities. *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). With this policy as a background, it is important to consider the agreement as a package, refined through the give and take process of bargaining to serve both sides. Thus, no single provision should be dismissed as inadequate without considering the fairness of the whole and the offsetting advantages gained through other provisions. *See Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 948-49 (9th Cir. 1986).

November 28, 1990, however, he settled his hand and shoulder claims for a total of $27,000. S.F. at 253. This amount is equivalent to about three years of weekly benefits. Because settlements ordinarily are made when an employee has reached "maximum recovery,"[4] the reasonable expectation would have been for petitioner's disability to have continued long past the time his employment would have terminated under the 18-month provision of the CBA. If that expectation had been fulfilled, petitioner and his counterpart collecting weekly benefits (hereinafter "Employee W") would have essentially equal overall benefits and income from Excel.

In reality, however, the medical prognosis on which petitioner settled his claim turned out to be drastically inaccurate, and, within six weeks from the date of his settlement, he was released to return to work with minimal restrictions. Under Section 11(F), petitioner was discharged based on his disability at the time of settlement. Thus, petitioner was left with his $27,000 and the choice of re-applying at Excel (*see* S.F. at 414-15), seeking work elsewhere, or taking a year and a half or so to consider

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[4] Prior to January 1, 1991, the general rule was that an employee was required to have achieved maximum recovery before the Industrial Accident Board would approve the settlement of his claim. *See* Industrial Accident Board Rule 55.15 (1990) (compromise settlement agreement must state that "the employee has achieved maximum recovery, or that other good reason exists for settlement prior to maximum recovery"). Thus, settling employees have (or at least claim to have) permanent disabilities. This general rule is now an absolute rule. The Texas Workers' Compensation Act, which became effective January 1, 1991, flatly prohibits any settlement "before the employee reaches maximum medical improvement." Tex. Rev. Civ. Stat. Ann. art. 8308-4.33(c) (Vernon Supp. 1993).

his options.[5] If Employee W had been released to return to work as petitioner was, he would have had his job at Excel, but only about $1,100 in weekly benefits from the date of petitioner's settlement until the date he was able to return to work. On the other hand, if Section 11(F) had *not* been in effect, and both petitioner and Employee W had gone back to work in January, 1991, it is obvious that petitioner would have been some $26,000 better off than Employee W, based on petitioner's inaccurate medical diagnosis.

Respondent believes that Section 11(F) constitutes a fair mechanism for resolving the status of employees who have no reasonable prospect of being physically able to return to work. Respondent submits that this provision does not discriminate *against* any employee for pursuing workers' compensation benefits in good faith; rather, it has the effect of leveling the field between employees who choose to or who must pursue workers' compensation benefits on a weekly basis and those who elect to settle their claims for a lump sum. Respondent acknowledges that reasonable minds may differ as to whether Section 11(F) constitutes the most desirable approach to the issues it covers. However, because the provision cannot be said to be discriminatory or retaliatory – or contrary to state law – on its face, an employee who would challenge its validity must necessarily seek construction and interpretation of the provision itself, and possibly of its relationship with other provisions of the CBA.

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[5] Petitioner's settlement check was equivalent to about 18 months' pay at Excel.

3. Petitioner's discrimination claim is actually a request for enforcement of another CBA provision.

Although petitioner argues in conclusory terms that Section 11(F) is unlawful, he is in fact seeking the most intricate CBA interpretation. Moreover, by relying on the interrelationship between Sections 11(F) and 11(D) to support his discrimination claim, he is effectively asking for *enforcement* of Section 11(D). Article XVII, Section 11(D), of the CBA authorizes respondent to discharge employees for "[a]bsence from work for any reason for a period of more than eighteen (18) months." Record at 359. Petitioner states that "the combined effect of these two provisions" was to allow recipients of weekly compensation benefits eighteen months to recover, but to require those who obtained lump sum settlements to be ready to work immediately.

The CBA can be the only basis for petitioner's claim that he (and other settling employees) were discriminated against by not being given eighteen months to recover. Texas law does not require that an employee with a work-related injury be given any particular amount of time to recover before his employer may lawfully terminate him. *See Pope v. MCI Telecommunications Corp.*, 937 F.2d 258 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1956 (1992) (42 days); *Swearingen*, 968 F.2d 559 (24 months). *See generally Harris v. American Red Cross*, 752 F.Supp. 737, 740 (W.D. Tex. 1990) ("Texas state courts have consistently found that an employee with a work-related injury may be lawfully terminated").

Petitioner himself concedes that all claims seeking enforcement of a collective bargaining agreement are preempted by Section 301, even if the plaintiff purports to bring the claim under state law. Petition at 7. Given his reliance on Section 11(D), that concession may be sufficient to resolve this case.[6]

B. The Court of Appeals' Decision Does Not Insulate Labor Contracts from Review.

Petitioner complains that an employer and a union will "be able to insulate [themselves] from review under state law," Petition at 12, because under the decision below, "there is no forum to which an employee may bring his claim that the CBA violates state law," Petition at 9. Petitioner does not and cannot cite any authority for this proposition, for it is simply untrue. It is true that, when an employer and a labor union negotiate an agreement and when an employee's claim requires interpretation of the agreement, state law may be applied only in the context of federal labor policy. Federal labor law, "necessarily uniform throughout the nation," is the proper standard by which terms in a collective bargaining agreement should be judged. *See Lingle*, 486 U.S. at 406. This does not mean that employees are left without a

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[6] Furthermore, this Court has never limited the scope of Section 301 preemption to contract enforcement, but rather has specifically stated that "the preemptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers*, 471 U.S. at 210. More recently, the Court affirmed that application of state law is preempted "if such application requires the interpretation of a collective-bargaining agreement." *Lingle*, 486 U.S. at 413.

remedy. The union and the employer cannot insulate themselves from review under *federal* law; and state law may be consulted in the formulation of federal law.

An employee may raise the concerns expressed in statutes such as article 8307c in a suit filed either under Section 301 or under Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a). Although state law will not govern the decision, it may be considered and, where appropriate, incorporated into federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 457 ("state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy").

Under Section 9(a) of the National Labor Relations Act, a union has the duty to represent all members of the bargaining unit in the negotiation, administration and enforcement of the collective bargaining agreement "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-14 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *see* 29 U.S.C. § 159(a). This duty has been implied as a corollary to the union's statutory role as exclusive representative of the bargaining unit. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 & n.14 (1983). Federal courts have jurisdiction over cases alleging breach of the union's duty of fair representation arising out of negotiation of a collective bargaining agreement, including, as would be the case here, alleged discrimination in the negotiation of seniority provisions. *Ackley v. Local Union 337*, 910 F.2d 1295, 1302 (6th Cir. 1990). *See*

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); *Deboles*, 552 F.2d 1005.

Furthermore, courts will not enforce a term of a collective bargaining agreement that violates public policy. *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). "Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). Whether a term of a collective bargaining agreement violates public policy is a matter of federal law for the court to determine. *Malden Mills v. ILGWU Nat'l Retirement Fund*, 766 F. Supp. 1202, 1209-10 (D. Mass. 1991) (citing *United Paperworkers' Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987); *W. R. Grace*, 461 U.S. at 766). This issue could arise in a variety of contexts under Section 301, including a suit by the employer to enforce the contract provision and a suit by the employee challenging his discharge under the provision.

C. This Case Is Not An Appropriate Vehicle for Revisiting the Scope of Federal Preemption.

In the evolution of Section 301 preemption doctrine, this Court has generally given Section 301 a broad preemptive scope. *See, e.g., Allis-Chalmers*, 471 U.S. 202; *Lucas Flour Co.*, 369 U.S. 95. Petitioner maintains that, despite the guidance provided by this Court in *Lingle* and *Allis-Chalmers*, the lower courts are in broad disarray in determining when state-law claims are or are not preempted. *See* Petition at 13-17. A closer analysis of the cases reveals

that petitioner's overbroad statement relies on lower court cases grappling with issues at the outer boundaries of the preemption field. In so doing, petitioner admittedly focuses on issues not raised in this case and ignores the fact that this case fits squarely within the definition of a preempted claim, i.e., one whose resolution requires interpretation of a term of a collective bargaining agreement. Accordingly, this case is not an appropriate vehicle for defining the outer limits of preemption in the workers' compensation context, much less in the broader areas suggested in the Petition.

Like this Court, lower federal courts have shown a strong tendency, both before and after *Lingle*, to find unionized workers' state-law claims preempted. *See* Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 606-07 (1992) (survey of recent preemption cases reveals broad preemption of unionized workers' claims). The pre-*Lingle*, lower court cases raised by petitioner are inapposite. *See* Petition at 13-14. The post-*Lingle* cases, with one exception, do not address preemption as it relates to a claim of retaliatory discharge in the workers' compensation context. *See id.* at 14-16, and cases cited therein. The one case cited by petitioner that does allege retaliatory discharge for filing a workers' compensation claim is *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990). The court in *Eldridge* evidenced no confusion when, relying heavily on *Lingle* and Alaska law, it concluded that the claim for breach of the implied covenant of good faith and fair dealing was not preempted. The *Eldridge* court

did not address preemption in the context of an offensive attack on the legality of the labor contract.

Almost all of the remaining cases cited by petitioner to demonstrate lower court confusion and disarray address issues at the outer parameters of the preemptive field. This case cannot assist lower courts that allegedly continue to grapple with the question of preemption when the collective bargaining agreement is raised as a defense to an otherwise independent state-law claim. Petition at 14-15. In this case, the CBA was raised offensively, not defensively. Similarly, this case will not help resolve the question of whether a claim of discharge under a clearly discriminatory labor contract is preempted. In this case, the challenged CBA provision is not discriminatory or retaliatory on its face, and has never been held to be discriminatory or retaliatory. Petitioner's claim is unique. Petitioner alleges that respondent – by applying a specific provision of the CBA – discriminated against him because he *settled* a workers' compensation claim not because he filed a claim, hired a lawyer, instituted a proceeding, or testified. What is disputed is whether the *provision itself* was discriminatory or retaliatory and, therefore, unlike the agreement in *Lingle*, this CBA must be construed to resolve the claim. Moreover, the state-law claim asserted here requires not only an interpretation of the CBA provision alleged to be unlawful, but also *enforcement* of yet another CBA provision. Under *Lingle* and its predecessors, petitioner's claim is clearly preempted.

Even petitioner admits that "the broader questions identified [in the Petition] are not squarely presented here," and he does "not suggest that this is the right case

in which to resolve all of them." Petition at 16. If confusion exists in the area of preemption law, this case is not the right vehicle for this Court to revisit the issue. Further review of this case would not be likely to assist lower courts that have difficulty determining the outer boundaries of the preemption field, because this case fits squarely within the center of that field.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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